SOON QUEK HOE & ANOR. v. REGINA.

[A. Cr. J. (Murray-Aynsley C.J.) May 4, 1954]

[Singapore — Magistrate's Appeal No. 26 of 1954]

Vagrancy Ordinance, 1939, s. 4(11) — "Suspected person" — Meaning of.

This was an appeal against the conviction of the appellants on a charge under s. 4(11) of the Vagrancy Ordinance. There was no evidence that the appellants were suspected persons on the facts which were the immediate cause of their arrests.

Held: the elements of "being a suspected person" and "loitering . . . with intent to commit an offence" under s. 4(11) of the Vagrancy Ordinance are distinct and the mere fact of loitering does not make the loiterer a suspected person.

Case referred to:—

(1) *Ledwith v. Roberts* (1937) 1 K.B. 232.

MAGISTRATE'S APPEAL.

J. D. Donnelly for the appellants.

A. V. Winslow (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Murray-Aynsley, C.J. : — This was a charge under section 4 of Ordinance 37 of 1939 of "being a suspected person" loitering, etc. There are two elements in these cases: that of being a "suspected person" and "loitering etc." The two elements are distinct and the mere fact of loitering does not make the loiterer a suspected person; see *Ledwith v. Roberts*[1]. Here there was nothing to make the appellants suspected persons other than the facts which were the immediate cause of the arrests.

Appeal allowed.

Solicitors for the appellant: *Laycock & Ong.*

Re KWAN WAH YIP & ANOR.

[A. Cr. J. (Spenser Wilkinson, J.) May 14, 1954]

[Penang — Originating Motion No. 26 of 1954]

Criminal law and Procedure — Criminal Procedure Code (Cap. 21), s. 305 — Bail — Discretion of Court — Guidance to Subordinate Courts.

A stay of execution should not be granted unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is no sufficient reason.

The granting of bail pending appeal by the Lower Court being a matter of discretion a Magistrate may, apart from the accused's statement that he intends to appeal, find in the circumstances of the case before him reasons which would justify the granting of bail. The considerations which should guide the Subordinate Courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are the gravity or otherwise of the offence; the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard; whether there are difficult points of law involved; whether the accused is a first offender or has previous convictions; the possibility of his becoming again involved in similar or other offences whilst at liberty; and whether the security imposed will ensure the attendance of the appellant before the appellate Court.

Cases referred to:—

(1) *Johore v. The King* (1907), 11 S.S.L.R. 36.

(2) *Rex v. Lim Soh Chwee & Anor.* Braddell's C. G. H. 178.

(3) *Doraisamy s/o Palanimuthu v. Public Prosecutor* (K. L. Criminal Application No. 2 of 1954 — unreported).

(4) *Regina v. Ooi Ah Kow* (1952) M.L.J. 95.

APPLICATION for Bail.

Lee Thean Chu for the applicants.

J. D. Peterkin (Federal Counsel) for the Crown.

The facts and arguments appear sufficiently from the judgment below.

Spenser Wilkinson, J. : — This was an application for bail pending appeal on the part of two persons convicted in Magistrates Court Cases Nos. P. (Town-1) 75 and 76 of 1954. The applicants were sentenced to twelve months' imprisonment upon a charge under section 411 of the Penal Code and also to one month's imprisonment on a second charge under the Minor Offences Ordinance, the sentences to run concurrently. The learned President who was sitting as a Magistrate refused bail.

At the conclusion of the hearing I intimated that the application would be dismissed and that I would give my full reasons for this decision later, which I now do.

There is a conflict of authority on the subject of granting bail pending an appeal from the Lower Courts to the High Court. In 1907 Fisher J. in the case of *Johore v. The King*[1] held that the intention of the relevant section of the Criminal Procedure Code is that execution shall be stayed pending appeal on the finding of reasonable security and there is no arbitrary discretion in the Court to refuse it. In the course of his judgment in that case he said :—

"I feel it necessary to say that bail ought not to be refused in such a case, for if it is, a man who has been convicted on insufficient evidence or wrong grounds may be forced to undergo rigorous imprisonment for weeks before he can get his conviction quashed, a miscarriage of justice of a very grievous kind. . . . . If an appeal is manifestly frivolous, or if security cannot be given which is reasonably sufficient to ensure that the accused will not run away, bail may rightly be refused — but not, I think, otherwise."

In 1911 the same learned Judge expressed a similar opinion in the case of *Rex v. Lim Soh Chwee and Low Quee*[2], the judgment of which is set out in *Braddell on Common Gaming Houses*, page 178. The learned Judge in this case said (at page 189):—

"That the Magistrate thinks the appeal is frivolous is no reason at all — it amounts only to an emphatic expression of his opinion that the conviction is right. That would be a reason for refusing bail in every case, ..."

Both these cases are referred to in the commentary in *Mallal's Criminal Procedure*, 3rd edition, at pages 362 and 360 respectively and have, I believe, been acted upon in this country for many years.

My attention, however, has been called to a recent decision of the High Court in Kuala Lumpur in *Doraisamy s/o Palanimuthu v. Public Prosecutor*[3]. In that case Wilson J., after referring to section 311 of the F.M.S. Criminal Procedure said:—

"Obviously the Court or the Judge has a discretion In my view a stay of execution should not be granted and will not be granted by me unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is no sufficient reason. The only other reason given in this case is that the applicant who has been advised verily believes he has good grounds for appeal. That, also in my view does not constitute grounds for releasing an applicant pending appeal."

I have no means of knowing whether the above cited decisions of Fisher J. were brought to the attention of the Court in this later case.

With the greatest respect to the views expressed by Fisher J. I think the relevant section of the Criminal Procedure Codes (section 305 of the Straits Code) must be construed as giving the Courts a discretion. The operative words of that section so far as a sentence of imprisonment is concerned are as follows:—

No appeal shall operate as a stay of execution but the Courts below and the High Court may stay execution on any ..... conviction or sentence pending appeal on such terms as to ..... the suffering of any punishment ordered ..... as to the Court seem reasonable."

Had the Legislature intended that a stay of execution should always be granted it would no doubt have so provided as it has in the case of whipping. To interpret the section in the way Fisher J. did seems to me to have the result that bail is to be automatically granted in almost every case — a result which the Legislature appears to me to have intended to prevent.

I find myself, with respect, in agreement with Wilson J. when he says that obviously the Court or the Judge has a discretion. It remains to consider upon what grounds that discretion should be exercised.

The Deputy Public Prosecutor cited certain English authorities with regard to the granting of bail in England pending appeal to the Court of Criminal Appeal, and it is quite clear that bail is only granted in England by that Court in exceptional circumstances. I do not think, however, that quite the same considerations apply in regard to appeals from the Subordinate Courts to the High Court, so that I do not think these authorities are of much assistance in dealing with the question now before me.

Mr. Lee Thean Chu on behalf of the applicants referred me to the decision of this Court in *Regina v. Ooi Ah Kow*[4]. That case, however, dealt with the admission to bail of persons awaiting trial. Entirely different considerations arise after trial and in my opinion once a person has been convicted by a Court of competent jurisdiction it must be assumed, in the absence of any obvious defect on the face of the record, that he has been rightly convicted unless and until the conviction is set aside.

In the application before me no grounds for granting bail were put forward except that the applicants were about to file notices of appeal and were advised by their Solicitors that it would be some time before the appeal could be heard. With regard to the last part of these grounds I desire to point out that I am aware of no reason why the appeal should not be heard within a very short time, if the appellants are anxious to proceed therewith. The record is not lengthy, and will no doubt be ready very soon. This Court sits for the hearing of criminal appeals twice a week, and in those cases where an appellant is not on bail an early date for hearing is always made available.

Before the hearing of this application I had seen the grounds of decision of the learned President and, although they were not before me on the application and in no way affected the considerations above outlined, those grounds make it clear that in refusing bail he was following the decision of Wilson J. cited above. It seems to me that with regard to the granting of bail by the trial Court the phrase used by Wilson J. that "a stay of execution should not be granted unless there are special reasons for doing so" might be interpreted, and was perhaps interpreted by the learned President in the present case, as placing a greater restriction upon the discretion of the Lower Courts than is justified by the wording of section 305 of the Criminal Procedure Code.

A good deal depends upon the meaning to be given to the expression "special reasons". Reading the judgment of Wilson J. as a whole I do not think he intended this expression to mean more than that there must be reasons beyond the mere intention to appeal or advice and belief that there are good grounds of appeal.

When a Lower Court has refused bail then I agree that the High Court should not interfere with the discretion of the Lower Court unless there are good reasons for so doing and as the High Court has not heard the case such reasons must be set out in the affidavit in support of the application for bail. There may be cases in which a Magistrate has made an error in law that is obvious on the face of the record and there may also be cases where it is plain that a Magistrate has seriously misinterpreted the facts. Circumstances such as these might be reasons if properly set out in the affidavit which would induce the High Court to grant bail where the Lower Court has refused it.

It seems to me, however, that the granting of bail pending appeal by the Lower Court being a matter of discretion a Magistrate may, apart from the accused's statement that he intends to appeal, find in the circumstances of the case before him reasons which would justify the granting of bail. The considerations which I suggest should guide the Subordinate Courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are the gravity or otherwise of the offence; the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard; whether there are difficult points of law involved; whether the accused is a first offender or has previous convictions; the possibility of his becoming again involved in similar or other offences whilst at liberty; and whether the security imposed will ensure the attendance of the appellant before the appellate Court.

I found myself in substantial agreement, in so far as applications to the High Court are concerned, with the views expressed by Wilson J. set out above and as the facts of the case before me are very similar I preferred to follow his decision rather than those of Fisher J. The application was, therefore, dismissed.

Application dismissed.

Solicitors for the applicants: *Hogan, Adams & Allan.*

REGINA v. R. W. DOWNEY.

[A. Cr. J. (Spenser Wilkinson, J.) May 21, 1954]

[Penang — Criminal Appeal No. 15 of 1954]

Penal Code, s. 304A — Causing death by a rash act — Sentence.

This was an appeal by the Public Prosecutor against the sentence imposed by the learned Magistrate on a charge under s. 304A of the Penal Code. The respondent had pleaded guilty to the charge and was fined $1,500 or 3 months rigorous imprisonment in default.

Held: (1) once the degree of rashness or negligence required to sustain the charge under s. 304A of the Penal Code has been proved, there cannot be many cases in which a sentence of a fine would be an adequate punishment; (2) in the present case the sentence of fine was inadequate and should therefore be altered to one of 5 months rigorous imprisonment.

Cases referred to:—

(1) *Public Prosecutor v. Sayer* (1947) M.U.L.R. 129; (1947) M.L.J. 142.

(2) *Cheon Keok v. Public Prosecutor* (1940) M.L.J. 103.

(3) *Public Prosecutor v. Mohamed Salleh bin Hitam* (1940) M.L.J. 187.

(4) *Andrews v. Director of Public Prosecutions* (1937) A.C. 576.

(5) *Rex v. Bateman* 19 Cr. App. R. 8.

CRIMINAL APPEAL.

J. D. Peterkin (Federal Counsel) for the appellant.

Respondent in person.

Spenser Wilkinson, J.: — This was an appeal by the Crown against the sentences imposed upon the respondent in respect of a charge under section 304A of the Penal Code and a charge of failing to stop after an accident under section 12(1) of the Motor Vehicles (Driving Offences) Proclamation.

The facts were that the respondent was seen in company with another soldier taking and driving away without Military permission a Military 1-ton lorry of which he was not normally the driver. Whilst driving along a straight piece of road near the 6th milestone on the main North-South road in Province Wellesley at a very fast speed the vehicle driven by the respondent collided with a Malay who was pushing a bicycle on the same side of the road in the same direction with two children aged 11 and 6 respectively on the bicycle. As a result of the collision the Malay who had been wheeling the bicycle and one of the children were thrown approximately 30 feet and killed instantaneously. The vehicle failed to slow down or stop. It was next seen at 6.30 p.m. at Machang Buboh where it had broken down and the accused was taken into Military custody. The left mudguard and the left front lamp were heavily damaged and bloodstained. The respondent admitted partaking of alcoholic refreshment prior to the accident.

Originally two charges were framed under section 304A of the Penal Code in respect of the death of each of the deceased. The learned Magistrate, however, quite properly amended these charges and framed one charge under section 304A of the Penal Code in respect of both deaths. This is in accordance with the decision in the case of *Public Prosecutor v. Sayer*[1].